APPENDIX B

SUMMARY OF CERTAIN CASES INVOLVING

DIPLOMATIC, STATE AND MILITARY SECRETS

Marbury v. Madison. In the leading case of Marbury v. Madison, 1 Cranch 137 (1803), the plaintiff, William Marbury, was seeking by mandamus to compel Secretary of State James Madison to issue his commission as one of John Adams' "midnight judges." Although the appointment had been made just prior to the assumption of the Presidency by Jefferson the commission had not been issued by John Marshall, Madison's predecessor as Secretary of State during the Adams' administration. Marshall, in the meantime, had become Chief Justice of the United States and sat on the case. The Attorney General was summoned for questioning and objected to answering one question as to the disposition of the commission, attributing his refusal to his obligation to the executive. The Court stated:

> "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive." I Cranch 137, 164.

> "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." 1 Cranch 137, 170.

The court decided that if intrusion into cabinet records was not involved, if the matter respected papers of public record and to a copy of which the law gave a right on payment of a small amount, and if the subject in issue was not one over which the executive can be considered as exercising control, a citizen may, as to such a paper, assert the right given him by an act of Congress. The court could issue a mandamus directing performance of a ministerial duty not depending on administrative discretion but on particular acts of Congress and the general principles of law.

As to the action prayed for, the court held that the Secretary of State was subject to the writ of mandamus but denied the writ on the ground that the provision of the act of Congress giving the original jurisdiction under which the suit had been brought was unconstitutional.

The trial of Thomas Cooper for seditious libel in the Circuit Court of Pennsylvania in 1800 produced a request for a subpoena to issue directed against the President of the United States, John Adams, who was the person allegedly libelled. The court refused to issue the subpoena and preemptorily informed the defendant that if he undertook to publish a false libel against the President without having proper evidence before him to justify his assertion, he would do so at his risk. This appears to be the first recorded instance of an effort to compel a President of the United States to produce a document at a court trial.

In the famous trial of Aaron Burr in 1807, President Jefferson was directed by a subpoena duces tecum to produce a certain letter alleged to contain information helpful to the defense. Judge Marshall allowed the subpoena stating that the President was not exempt per se from process, although he was free to keep from disclosure such as he deemed confidential. Marshall evidently overlooked the Chase opinion in the Cooper case. The Burr trial produced for the first time judicial consideration of the problem of official records being subjected to public disclosure. Marshall's ruling has not been followed by subsequent court decisions nor adhered to by the Presidents themselves. Marshall indicated that he believed the power of the court fell short of direct compulsion of the President to produce.

Jefferson refused to acknowledge the subpoena denying the right of the judicial branch to order him as President to do anything. The letter requested was given by Jefferson to the Attorney General with instructions to keep out of court so much as the U. S. Attorney deemed confidential. Jefferson subsequently stated his fundamental legal position as follows:

> "He, of course, (the President) from the nature of the case, must be the sole judge of which of them the public interest will permit publication. Hence, under our constitution, in request of papers, from the legislative to the executive branch, an exception is carefully expressed, as to those which he may deem the public welfare may require not to be disclosed." Letter of June 17, 1807 to U. S. Attorney Hay, Thomas Jefferson Writings, (Ford), Volumn 9, Page 57.

Jefferson was prepared to resist by force if necessary an attempt to obtain the papers which Burr sought. Quite fortunately the issue was not pressed either as to the President himself or to the Secretaries of War and Navy, who also were directed personally to attend.

Totten, Adm'r v. U.S. The case of Totten, Administrator v. U. S., 92 U.S. 105 (1875), involved an action for payment for services alleged to have been rendered by one William A. Lloyd under a contract with President Lincoln. The services included travel behind the Confederate lines for the purpose of ascertaining the number and disposition of Confederate troops and the plans of Confederate fortifications. Lloyd accomplished his mission with considerable success and made full reports of his findings to the Union authorities. The Court of Claims found that the services were rendered as alleged and that Lloyd was only reimbursed for his expenses. The Supreme Court in denying recovery on the contract stated at page 106:

> "The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employee and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. The condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent."

The court went on to say that secrecy was a condition of the agreement and that the disclosure of the information necessary to the maintenance of the action defeated recovery. The opinion continued at page 107:

> "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed."

De Arnaud v. U.S. In the later action of De Arnaud v. United States, 151 U.S. 483 (1894), presenting the question of whether "secret services" were to be distinguished from a "military expert services", the Supreme Court had occasion to consider an appeal from a Court of Claims judgment dismissing a complaint in which $100,000 was sought for services rendered by De Arnaud as a "military expert" employed for "special and important duties" by General Fremont for and in behalf of the Union Army. De Arnaud was a Russian, resident in the United States, with prior experience as a Lieutenant of Engineers in the Russian Army. In 1861, Fremont had employed him to pass through the enemy lines, observe the order of battle, and report back. His mission resulted in the saving of Paducah, Kentucky. He was paid $600.00 for his services on a receipt marked "for special services rendered to the U. S. Government in travelling through the rebel parts of Kentucky, Tennessee. . .which led to successful results." His claim was supported by certificates from Generals Grant and Fremont. President Lincoln ordered the claim paid if just and equitable. The Secretary of War paid De Arnaud $2000 which was received under protest although the receipt acknowledged payment in full. Subsequently, De Arnaud instituted an action in the Court of Claims.

The Supreme Court could recognize no distinction between "the secret services" rendered in the Totten Case and the "military expert services" which De Arnaud claimed to have rendered. The receipt which De Arnaud signed was considered to operate as a bar to any further demand. At page 490 of the opinion, the court stated: "Accounting officers have no jurisdiction to open up a settlement made by the War Department from secret service funds and determine unliquidated damages."

Opinion of Atty. Gen. Speed. In 1865, Attorney General James Speed advised President with regard to the Secretary of Navy's liability to respond to individual or state requests for the production of exemplified copies of military courts-martial records:

> "Upon principles of public policy there are some kinds of evidence which the law excludes or dispenses with. Secrets of state, for instance, cannot be given in evidence and those who are possessed of such secrets are not required to make disclosure of them. The official transactions between the heads of departments of the Government and the subordinates are, in general, treated as 'privileged communication.' The President of the U. S., the heads of the great departments of the Government, and the Governors of the several states, it has been decided, are not bound to produce papers or disclose information communicated to them when, in their own judgment, the disclosure would, on public considerations, be expedient. These are familiar rules written down by every authority on the law of evidence." 11 Op. A. G. 137, 142 (1865).

U.S. v. Curtiss-Wright. In the case of the U. S. v. Curtiss-Wright Export Corporation, 299 U. S. 304 (1936), the Supreme Court was called upon to determine the constitutionality and legality of an indictment charging violation of a joint resolution of Congress, and a Presidential proclamation issued pursuant thereto, which forbade the shipment of arms or ammunition to foreign nations engaged in armed conflict in the Chaco. The case arose on a demurrer to the indictment and in part challenged as an improper delegation of power the unrestricted scope of executive action without adequate standards imposed by the Congress. In speaking of the exclusive province of the executive in the area of intercourse with foreign nations, the Court said at pages 319 and 320:

> "Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."...
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> "It is quite apparent that if, in the maintenance of our international relations, embarrassment--perhaps serious embarrassment--is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty--a refusal the wisdom of which was recognized by the House itself and has never since been doubted. In his reply to the request, President Washington said:
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> > 'The Nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have

been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.' 1 Messages and Papers of the Presidents, p. 194"

Chicago & Southern v. Waterman SS. A more recent case has come down from the Supreme Court on the problem of the exclusive domain of the executive. The case of Chicago and Southern Air Lines v. Waterman Steamship Corporation, 333 U. S. 103 (1948), arose on an appeal from a denial by the Civil Aeronautics Board of a certificate of convenience and necessity for an international air route to Waterman and the award of the same to Chicago & Southern. The award could be made only with the express approval of the President.

On this question, the court said:

"The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the Government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. Coleman v. Miller, 307 US 433, 454; United States v. Curtiss-Wright Corporation, 299 US 204, 319-321; Oetjen v. Central Leather Co., 246 US 297, 302. We therefore agree that whatever of this order emanates from the President is not susceptible of review by the Judicial Department. 333 US 103, 111, 112."

It might be noted that the Waterman case was a 5-4 decision. Notwithstanding, it still is good law today. "The issue...involves a challenge to the conduct of diplomatic and foreign affairs, for which the President is exclusively responsible." Johnson v. Eisentrager, 339 US 763 (1950), at page 789, citing both the Curtiss-Wright and Waterman cases. "It is pertinent to observe that any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Harisiades v. Shaughnessy, 342 US 580, 588, 589, (1952), again citing the Curtiss-Wright and Waterman cases. See also United States v. Reynolds, 73 S. Ct. 528 (1953)